The Applicability of the Alien Tort Statute to Human Rights Violations by Private Corporations

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I. Introduction: The US Supreme Court Granted Certiorari

On April 3rd 2017, the New York Times published an article with the heading: "Supreme Court to Weigh if Firms Can be Sued in Human Rights Cases"[1]. On the same day, the Supreme Court of the United States had granted the petition for certiorari to consider an issue that now has come before the highest US court already for the second time. The Second Circuit through the case *In re Arab Bank*[2] has again brought the question before the Justices whether private corporations can be sued under the Alien Tort Statute of 1789 (ATS) for aiding and abetting human rights violations that occurred outside the territory of the United States. The Supreme Court is now to provide guidance on the issue that is not uniformly assessed by the US Circuit Courts. The current case is the third decision on the ATS that has ever come before the Supreme Court.

In re Arab Bank concerns the potential liability of the Jordan based Arab Bank for its providing of financial services through a branch in New York. More specifically, the bank is accused of having processed financial transactions for groups that are linked to terrorism. The

[1] Article by ADAM LIPTAK, available on https://nyti.ms/2otRL3u.
[2] *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144 (2d Cir. 2015).

ATS contains a basis for original jurisdiction in favor of the US district courts if human rights violations by aliens have occurred abroad[3]. It has nevertheless been unclear and is still not uniformly assessed by the Circuit Courts whether the statute is applicable to corporations that committed human rights violations or aided and abetted such violations that occurred outside US territory.

The Supreme Court had originally intended to answer this question when it granted the petition for certiorari in the *Kiobel*[4] decision, where it had stated: "The Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability […]. We granted certiorari to consider that question."[5]. The Justices, however, after ordering supplemental briefing and an oral argument from the parties on the aspect of the extraterritorial applicability of the statute, focused solely on the latter issue. The majority Supreme Court opinion in *Kiobel* eventually arrived at the conclusion that the petitioners' claims were to be dismissed. The Court found that the presumption against extraterritoriality, which it stated to apply to the Act despite of its primarily jurisdictional nature, was not rebutted with regard to the statute[6].

On these grounds, the decision of the United States Court of Appeals for the Second Circuit[7] was affirmed by the Supreme Court. Unlike the highest US Court, the Circuit Court had explicitly addressed and discussed the question of corporate liability under the ATS. It became the first appellate court to reject the claim that the statute was applicable to corporations, constituting a deviation from the opinions of its sister Circuit Courts. The decision did not only lead to a circuit split, it also effected a division within the Second Circuit as the concurring opinion by Judge *Leval* favored the possibility of corporate liability under the ATS. The reading thus introduced by the majority, however, did not find followers among the other Circuit Courts that, in the contrary, continued to assume the possibility of corporate liability under the Act. The Second Circuit did not neglect this adverse reaction and in fact stated that it is aware that it stands alone with its position among the Circuit Courts, however confirming its attitude on the issue[8].

Against this background it becomes clear that the expected Supreme Court decision is of fundamental importance not only to corporate litigation worldwide. The ATS also is one of

[3] See the more detailed analysis of the statute's character and its scope of application in II.
[4] *Kiobel v. Royal Dutch Petroleum Co*., 133 S.Ct. 1659 (2013).
[5] *Kiobel* (S.Ct.), at 1663.
[6] *Kiobel* (S.Ct.), at 1669.
[7] *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2d Cir. 2010).
[8] *In re Arab Bank*, at 151.

the only statutes of its particular kind that grants civil relief for human rights violations occurred abroad with virtually no connection to the forum state's territory. For the human rights litigation and the continuously increasing importance of issues related to Corporate Social Responsibility, the Supreme Court decision will accordingly be of substantial interest as well.

II. The Alien Tort Statute of 1789

The Alien Tort Statute (28 U.S.C. § 1350 – Alien's action for tort), also called the Alien Tort Claims Act, reads as follows:

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The ATS was enacted as part of the first United State's Judiciary Act[9] in 1789. It has not been applied by courts for about two hundred years after its coming into force[10]. The statute allows alien plaintiffs to bring claims against foreign defendants before US courts for violations of international law that were committed outside US territory[11]. The Act was first applied in *Filártiga*[12], a case that came before the Second Circuit after the district court had initially dismissed the claims for lack of subject matter jurisdiction. The facts did not involve a corporation as defendant, but the Court took the opportunity to provide one of the first examples to demonstrate how far the statute's scope of application can be considered to reach. In this decision, the Court took jurisdiction over a suit brought by a Paraguayan citizen against a former Paraguayan inspector General of Police for human rights abuses in violation of international law. Jurisdiction over the case was assumed although the crime or tort itself did not have any relation to the United States.

[9] Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789).
[10] ALISON BENSIMON, Corporate Liability Under the Alien Tort Statute, Loyola University Chicago International L. Rev., Vol. 10, Issue 2, 199.
[11] RON A. GHATAN, The Alien Tort Statute and Prudential Exhaustion, 96 Cornell L. Rev. 1273, 1273 (2011).
[12] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

From that point of time on, the ATS became a more and more frequently used instrument in seeking redress for human rights abuses in civil actions[13]. The defendants in these suits began to expand from state actors to private individuals and to private corporations eventually. With regard to corporations as defendants under the ATS, courts have been virtually unanimously holding that these actors can be subject to lawsuits under the statute[14]. The relevant opinions, however, mostly did not offer exhaustive explanations as to why they considered corporations to be suitable defendants.

The statute reads as a purely jurisdictional act that does not concern questions as to the substantive law applicable to the dispute. The Supreme Court stated that the ATS is to be considered a mere rule of jurisdiction[15]. The reference to the law of nations in the text of the statute, however, seems to import certain substantive notions into the application of the provision. In particular, there seems to be necessary an at least summary analysis as to an international law violation before a "tort" within the meaning of the provision can be assumed. This consideration is backed by the fact that the Supreme Court stated that the Act could despite of its primarily jurisdictional character not be considered "stillborn" and was enacted on the basis of the understanding that "the common law would provide a cause of action"[16].

The analysis of the following case law[17] will provide an overview over the relevant guidelines that courts adopted with regard to the interpretation of the ATS. This will illustrate the background against which the Supreme Court is now asked to rule on the issue that has far reaching implications for the human rights and corporate litigation worldwide.

III. Milestone Decisions in the History of the Alien Tort Statute Jurisprudence

A. The Second Circuit in *Kadič*

[13] Cf. DAVID P. STEWART, Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute, American Society of International Law, Vol. 107 No. 3, 601 (2013), who considers the ATS as "the main engine for transnational human rights litigation in the United States".

[14] See e.g. *Abdullahi v. Pfizer, Inc*., 562 F.3d 163, 187 (2d Cir. 2009); In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d 289, 314 (S.D.N.Y. 2003); *Doe v. Unocal Corp*., 395 F.3d 932 (9th Cir. 2002).

[15] *Sosa v. Álvarez-Machain*, 542 U.S. 692, 713 (2004).

[16] *Sosa*, at 715; cf. on the present value of this assumption JAN VON HEIN, Zeitschrift für Unternehmens- und Gesellschaftsrecht 2016, 414, 430 f.

[17] Cf. regarding order and emphasis in case law RACHEL PAUL, Interpreting Liability Under the Alien Tort Statute, University of Miami L. Rev., Vol. 67:705 (2013).

The first noteworthy case *Kadič*[18], decided by the Second Circuit. This decision did not involve corporate defendants, but it was used in other opinions on the statute to justify arguments regarding the question of corporate liability under the ATS in both directions, i.e. denying and affirming the possibility of corporate liability.

The court had to decide the issue whether a private actor, *Karadzic*, could be liable under the ATS. *Karadzic*, the President of the Bosnian-Serb republic and commander of the military forces, was alleged to have directed systematic human rights abuses during the Bosnian civil war. Specifically, the plaintiff victims of these abuses claimed acts of rape, forced prostitution, torture and other atrocities committed by the Bosnian-Serb military during the war.

In its analysis, the Court missed to decide clearly the question whether domestic law or international law was relevant for the determination of the defendant quality[19]. It did so by rephrasing the standard according to which the issue had to be assessed. First, the Court asked whether the remedies were available if the defendant was a person not acting under the direction of a state[20], while the second version asked whether the plaintiffs have pleaded violations of international law[21].

After its examination of further international law sources, the Court found that private actors could violate international law, such as war crimes and genocide, even in their capacity as private individuals[22]. The Court justified this finding through a reference to the Convention on the Prevention and Punishment of the Crime of Genocide, which states that "persons committing genocide … shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals"[23]. Moreover, the Court recurred to *jus cogens* considerations and the fact that the international community has recognized the liability of private parties for war crimes since World War I[24].

[18] *Kadič v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).
[19] RACHEL PAUL (see supra n. 17), 713.
[20] *Kadič*, at 236.
[21] *Id.*, at 238.
[22] *Id.*, at 239.
[23] Convention on the Prevention and Punishment oft he Crime of Genocide, Dec. 9, 1948, art. 4, 102 Stat. 3045, 3045 78 U.N.T.S. 277, 280).
[24] *Kadič*, at 243.

The opinion, however, in its aftermath has been used to justify opposed results in the question of corporate liability under the ATS[25].

B. The US Supreme Court in *Sosa*

The US Supreme court has so far heard two cases regarding the ATS, but it was only in *Kiobel* that the Court explicitly addressed the question of corporate liability under the statute. However, primarily the *Sosa*[26] decision conveys important understandings as to the general application of the statute. Here, the Supreme Court comprehensively analyzed the ATS and laid down the decisive criteria for a damage claim under the Act[27].

The case concerned a civil suit brought by a Mexican national against *Sosa*, also a Mexican national. The plaintiff *Álvarez-Machain* alleged that *Sosa* had falsely arrested him in violation of the law of nations, seeking damages under the ATS. The court examined the question of the nature of the ATS. It held that the act was only jurisdictional, but that it was enacted under the assumption that common law would provide a cause of action[28]. It then referred to the offenses that were originally envisaged when the act was adopted. These offenses are: violation of safe conducts, infringement of the rights of ambassadors and piracy[29]. The statute, however, was not limited to these offenses but in fact open to change to actual challenges. With regard to the relevant claims under the statute nowadays, the Court stated that claims have to have "as definite content and acceptance amongst civilized nations"[30] as the three original offenses.

An important part in the decision is the footnote twenty, where the Court said that a "related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[31] The Court then went on to examine whether arbitrary arrest violated a norm of international law. It did, however, not explicitly refer to international law

[25] *Kiobel* (2d Circuit), at 128-30 (infers the applicability of international law and therefore denies corporate liability); *Doe v. Unocal Corp*., 395 F.3d 932, 50-51 (9th Cir. 2002) (infers the decisiveness of domestic law and assumes corporate liability).
[26] *Sosa v. Álvarez-Machain*, 542 U.S. 692 (2004).
[27] DANIEL PRINCE, Corporate Liability for International Torts: Did the Second Circuit Misinterpret the Alien Tort Statute?, Seton Hall Circuit Review, Vol. 8: 43, 66 (2011).
[28] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).
[29] *Id.*
[30] *Id*. at 732.
[31] *Id*. at 733 n.20.

in order to determine the defendant's liability in relation to the so found norm[32]. The argument put forward by *Álvarez-Machain*, that the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights were violated, was rejected by the Court. It argued that these legal instruments did not impose obligations as a matter of international law and the United States' ratification of them was made under the express understanding as to their non-self executing nature[33].

Another noteworthy passage in the context of the defendant quality can be found in the concurring opinion of *Breyer*. He stated that courts should consider "whether international law extends the scope of liability to the perpetrator being sued, if the defendant is a private actor."[34] The passage seems to justify the assumption that international law determines the jurisdiction of the court and could therefore be relevant with regard to the issue of corporate accountability.

C. The Eleventh Circuit on the Interpretation of the ATS

The Eleventh Circuit was asked to rule on claims that were brought under the ATS as well. The analysis of two exemplary decisions of this court will further illustrate the background against which the Second Circuit ruled in its *Kiobel* decision. Both *Romero*[35] and *Sinaltrainal*[36] found that corporations can be held accountable under the ATS.

In *Romero*, one of the plaintiffs was a Colombian trade union that sued Drummond Co., a Colombian subsidiary of a coal mining company in Alabama, among other defendants. The plaintiffs' allegation was that the defendants violated international law by hiring Colombian paramilitary operatives to torture and kill its union leaders[37]. The remedy sought were damages under the ATS.

In answering the question as to the possibility of corporate liability under the ATS in the affirmative, the Court first put forward a textual argument. It stated that the text of the statute did not explicitly exempt corporations from liability[38]. The judges moreover referred

[32] Cf. RACHEL PAUL (see supra note 17), 718.
[33] *Sosa*, at 734-35.
[34] *Sosa*, at 760 (*Breyer*, J., concurring).
[35] *Romero v. Drummond Co*., 552 F.3d 1303 (11th Cir. 2008).
[36] *Sinaltrainal v. Coca-Cola Co*., 578 F.3d 1252 (11th Cir. 2009).
[37] *Romero*, at 1308-09.
[38] *Id*. at 1315.

to precedent in citing *Aldana v. Del Monte Fresh Produce, Inc.*[39], a case that, however, merely presumed corporate liability, avoiding a legal justification for this outcome[40]. The argumentative value of the precedential argument put forward by the Court in *Romero* is therefore doubtful.

The other case in which the Eleventh Circuit assumed that corporations were viable defendants under the ATS was *Sinaltrainal*. The defendant employers in the dispute were bottling companies in Colombia as well as allegedly connected Coca-Cola companies. Trade union employees brought the suit for damages claiming conspiracy with Colombian paramilitary forces to engage in torture and murder.

The Court made clear that corporations were suitable defendants for the purposes of the ATS by referring to the historical fact of an expansion of the statute's scope of application: Early cases had as defendants state actors, but in the course of the ATS litigation, the Act was interpreted to reach also private individuals and corporations[41]. A further justification for its finding of the possibility of corporate liability consists in the court's reference to the *Kadič* holding, which considered acts such as war crimes constituted a violation of international law irrespective of the fact whether the perpetrators undertook the acts "under the auspices of a state or only as private individuals"[42].

D. Introducing the Circuit Split: The Second Circuit in *Kiobel*

The *Kiobel* decision[43] by the United States Court of Appeals for the Second Circuit is of central importance with regard to the uncertainties now existing with regard to the question of corporate liability under the ATS. The court in *Kiobel* was the first appellate court to deviate from the insofar virtually unanimously held view that private corporations could be held accountable for aiding and abetting human rights violations under the ATS.

1. Facts and Court Decision

[39] *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir. 2005).
[40] Cf. MARA THEOPHILA, "Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After Kiobel v. Royal Dutch Petroleum Co., 79 Fordham L. Rev. 2859, 2882 (2011).
[41] *Sinaltrainal*, at 1263.
[42] *Kadič*, holding.
[43] *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2d Cir. 2010).

As it is characteristic for constellations in the ATS litigation, the facts of the case are practically entirely located outside the US. The plaintiffs in the case, former residents of the Ogoni region in Nigeria, alleged that the defendants, Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC, through a common subsidiary aided and abetted the Nigerian government in committing human rights violations directed at plaintiffs[44]. In particular, the violation was alleged to consist in the killing of Ogoni residents by Nigerian military forces and in raping and arresting residents as a response to their protest against the oil exploitation of the region that was conducted by the subsidiary of the Royal Dutch and Shell.

The majority opinion dismissed the complaint. It first stated that the finding of a norm of international law prohibiting the claimed acts was only the first step in the analysis of the ATS. The judges considered it to be additionally necessary that there was a norm assigning liability to corporations for violating that international norm in order to be able to assume corporate liability[45]. The Court eventually found that such a norm as required in the second prong did not exist[46].

2. The Reasoning of the Majority Opinion

The Court based its analysis with regard to the oil companies' defendant quality on international law, rejecting the idea that domestic law was decisive insofar. Specifically, it found that the ATS required the court to "examine the specific and universally accepted rules that the nations of the world treat as binding *in their dealings with one another*."[47]

The majority opinion inferred this result from different aspects of the Supreme Court's *Sosa*[48] decision. From *Sosa*'s holding, which clarified the character of the statute, the Court drew the conclusion that it was to look into customary international law in order to determine which claims "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms"[49] justify a cause of action under the ATS[50]. Another aspect in the *Sosa* judgment used by the Court to justify its finding of the

[44] *Kiobel* (2d Cir.), at 123.
[45] *Id.* at 131.
[46] *Id*. at 148.
[47] *Kiobel* (2d Cir.), at 118.
[48] Cf. supra III B.
[49] *Sosa*, at 725.
[50] *Kiobel* (2d Cir.), at 125-26.

decisiveness of international law consists in the abovementioned[51] footnote twenty. The majority opinion infers from that footnote that "international law, and not domestic law, governs the scope of liability for violations of customary international law under the ATS."[52]. According to the court, international law is relevant both for the question of determining liability under the ATS and whether the scope of liability extends to the particular defendant[53].

After stating the two-prong test and the relevance of international law to the assessment of both questions, the Court went on to look for a rule of customary international law that assigned liability to private actors for violations of international law. It first consulted the Restatement (Third) of Foreign Relations Law, concluding that the subjects of international law were those entities that are capable of having rights and duties under international law[54]. The Court reasoned that the defendants would have to be subject to the customary international law of human rights in order to be held liable under the ATS[55]. Under this assumption, the majority opinion denied liability, arguing that the obligations of international human rights law were considered to only extend to individuals and states[56].

In order to corroborate this finding, the Court analyzed the decisions and statutes of different international tribunals with regard to their treatment of corporations and their alleged violations of the law of nations. The court's conclusion was that "no international tribunal […] has ever held a corporation liable"[57] insofar. It referred to the Military Tribunal of Nuremberg, which it found to have exercised jurisdiction only over natural persons[58]. The Tribunal had refused to hold the corporation I.G. Farben criminally liable for its involvement in the killings by the Nazis.

Moreover, the Court named the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia as justifications for the reluctance of international law to hold corporations liable[59]. Additionally, the majority opinion used the Rome Statute establishing the International Criminal Court as an example. The Statute's scope of application in jurisdictional matters only extends to natural persons. In view of the

[51] Cf. supra III B.
[52] *Kiobel* (2d Cir.), at 126.
[53] *Id*. at 128.
[54] *Id*. at 126.
[55] *Id*. at 126 n. 28.
[56] *Id*. at 127.
[57] *Id*. at 132.
[58] *Id*. at 133.
[59] *Id*. at 136-37.

refusal of a proposal to expand the jurisdictional scope advanced by the French delegation, the Court inferred that corporate liability was expressly rejected with regard to human rights violations[60].

Finally, the Court analyzed several scholarly works and international treaties; where the treaties contained the possibility for imposing liability on corporations, the majority opinion did not consider this sufficient proof of an according customary international law rule[61]. The cited academic contributions confirmed the Courts view of a lacking customary international law rule holding corporations liable for the violations of the law of nations. These works, however, mainly reiterated the arguments put forward by the Court in its analysis of international tribunals. Accordingly, the Court concluded that the ATS did not provide it with jurisdiction to hear the case against the corporate defendants[62].

3. The Concurring Opinion

Judge *Leval* wrote the concurring opinion in the decision. He concurred in the judgment, but not in the majority's reasoning. Specifically, he disagreed with the outcome that corporations could not be held liable under the ATS.

As a starting point, the concurring opinion agreed that the "place to look for answers whether any set of facts constitutes a violation of international law is […] international law."[63]. However, it denied that the analysis as to criminal liability was sufficient to consider the structurally different civil liability that is addressed in the ATS. Judge *Leval* sets out that civil compensatory liability has a substantially different nature and purpose than criminal liability[64]. Accordingly, the majority's search for liability grounds in international criminal law is considered misguided by the minority opinion.

Judge *Leval* makes two important statements with regard to corporate liability in international civil law. First, he holds that international law recognizes and assigns civil liability to abstract entities. As corporations, like states, can be considered to be such abstract entities, *Leval* does not find a great leap of argument in the assumption of a theory of liability that encompasses corporations[65]. Secondly, the minority opinion holds that human rights

[60] *Id*. at 139.
[61] *Id*. at 141.
[62] *Id*. at 149.
[63] *Id*. at 174 (*Leval*, J., concurring).
[64] *Id*. at 166-67 (*Leval*, J., concurring).
[65] *Id*. at 170-71, n.24 (*Leval*, J., concurring).

treaties assign the task of enforcing their provisions to states, meaning that the procedure is attributed to their domestic law. The opinion stresses that it is "the worldwide practice to impose civil liability on corporations"[66].

Judge *Leval* accordingly concludes that there is the possibility of corporate liability under the ATS; nevertheless, he concurs in the majority's judgment because he finds that the case should be dismissed for failure to state a proper claim for secondary liability: The mere knowledge of abuses was not sufficient "to support the inference of a purpose on the defendant's part to facilitate human rights abuses."[67]

E. Sister Circuit Jurisprudence After *Kiobel*

The Second Circuit decision in *Kiobel* did not find followers among its sister Circuits. Two decisions will illustrate the reactions of the Second Circuit's opinion.

The DC Circuit decided in *Doe*[68] that the corporation Exxon Mobil and its subsidiaries were suitable defendants under the ATS. The plaintiffs were Indonesian villagers who alleged that they had suffered human rights violations by the Indonesian military that in turn was hired by Exxon Mobil. In reaching this conclusion, the Court rejected the *Kiobel* court's reasoning as to footnote twenty in *Sosa*. Moreover, it based corporate liability under the ATS in domestic, rather than international law.

The Court delineated the extent of informative content from the *Sosa* decision. It stated that the Supreme Court decision extended to the meaning that international law was to be assessed for the finding of a violation of a certain rule. Here the Court draw a line: The issue regarding corporate liability in this context, however, meant asking whether a corporation could "be made to pay damages for the conduct of its agents in violation of the law of nations"[69].

The Court found that international law leaves to US domestic law the determination of the question of corporate liability under the ATS. The US law, as stated by the opinion, "has been uniform since its founding that corporations can be held liable for the torts committed by their agents."[70] This reading put forward by the DC Circuit is based on a distinction between

[66] *Id*. at 169 (*Leval*, J., concurring).
[67] *Id*. at 193, 196 (*Leval*, J., concurring).
[68] *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).
[69] *Doe*, at 41.
[70] *Id.*, at 57.

rules of conduct and remedies. The latter is, according to the judges, to be assessed under domestic law and therefore leads to the interpretation that considers corporations suitable defendants under the ATS.

The Seventh Circuit gave another example for a decision in the aftermath of *Kiobel* that addressed the issue of corporate liability under the statute. *Flomo v. Firestone Natural Rubber Co*.[71] shows parallels to the Eleventh Circuit's *Doe* opinion. The judges in *Firestone,* though in the end deciding in favor of the defendant corporation Firestone, stated the possibility of corporate liability under the ATS, basing their opinion on domestic law considerations. Judge *Posner*, who wrote the opinion, inferred the possibility of corporate liability from a delineation as well.

He stated that there was a difference between a principle of international law, being a matter of substance, and the way in which it is enforced, an issue that is left to the procedural law of the individual nation[72]. The majority opinion therefore states the decisiveness of domestic law with regard to the question of corporate liability as a matter of procedure. International law was not considered the right place to look for the answer to this issue.

The third interesting decision in the aftermath of the *Kiobel* opinion is *Sarei v. Rio Tinto, PLC*[73], decided by the Ninth Circuit. The difference to the aforementioned decisions by the DC and Eleventh Circuit lies in the reasoning the Court based its affirmation of corporate liability under the ATS upon. It did not recur to domestic law but rather inferred from international law that corporations were accountable under the statute. It analyzed the Supreme Court's *Sosa* decision and concluded that the ruling required "an international-law inquiry specific to each cause of action asserted", so that for each asserted claim of customary international law under the ATS the courts were to consider which actors were suitable to violate it[74].

The Court then went on to state that the prohibition of genocide was an internationally accepted norm, the violation of which was actionable under the ATS[75]. In analyzing the case law of the ICJ, the Court then found evidence of corporate liability in international law[76]. In looking at the particular claim and asking "whether international law extends its prohibitions

[71] *Flomo v. Firestone Natural Rubber Co*., 645 F.3d 1013 (7th Cir. 2011).
[72] *Flomo*, at 1019.
[73] *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011).
[74] *Sarei*, at 748.
[75] *Id.*, at 758.
[76] *Id.*, at 759-761.

to the perpetrators in question"[77], the Ninth Circuit has employed a reading of the ATS in connection with the *Sosa* decision, which is narrowly tailored to the particular violation claimed.

The three sister circuit decisions demonstrate that corporate liability under the ATS was found to be based in domestic and international law. It is especially noteworthy that both the *Sarei* Court and the *Kiobel* opinion consider international law with regard to the corporate liability issue but still reach different results on the question. With regard to considerations on the expected Supreme Court decision, it will therefore be interesting to have a closer look on the relevant standard according to which the corporate liability issue is to be considered. Additionally, if the standard will be found to lie in international law, it will be relevant to go further into the question of the preferable reading of the ATS in connection with the Supreme Court's Sosa decision, as both the *Sarei* and the *Kiobel* Court refer to this opinion in their analysis.

F. The US Supreme Court in *Kiobel*

In *Kiobel*, the US Supreme Court was to address the question of corporate liability under the ATS. However, the Justices put the main emphasis on the extraterritorial application of the statute, so that the contentious issue of corporate accountability remained unanswered and could be brought up again just four years later in 2017, in the case *In re Arab Bank*.

The Supreme Court in *Kiobel* clarified the question of extraterritorial application. It stated that the presumption against extraterritoriality applies to the ATS[78]. This means that there is a general presumption against the extraterritorial application of US law, unless a contrary Congressional intent appears[79]. An important passage in the judgment refers to corporate liability in connection with the ATS. Still on the question of the statute's extraterritorial applicability, the Court holds that claims that "touch and concern the territory of the United States […] must do so with sufficient force" in order for the presumption to be overcome[80]. The majority then goes on to state that "[c]orporations are often present in many

[77] *Id.*, at 761.
[78] *Kiobel* (S.Ct.), at 1669.
[79] Cf. generally on the presumption against extraterritoriality, WILLIAM S. DODGE, Understanding the Presumption against Extraterritoriality, Berkeley Journal Int'l Law 85 (1998), 85.
[80] *Kiobel* (S.Ct.), at 1669.

countries, and it would reach too far to say that mere corporate presence suffices"[81], in order to rebut the presumption.

This passage can be read as supporting corporate liability under the Act because the Court held that only *mere presence* does not suffice to rebut the presumption and to therefore find the statute applicable. It can be reasonably concluded that anything more than mere presence would open the possibility of corporate accountability.

IV. Considerations on the Expected Supreme Court Decision

The Supreme Court should use the opportunity given to it through *In re Arab Bank* to clarify that private corporations can be held liable for aiding and abetting human rights abuses under the Alien Tort Statute.

The *Kiobel* decision of the Second Circuit has brought uncertainties to the otherwise virtually unanimously held view that corporations are viable defendants under the statute. There are several arguments that speak against the outcome reached by the *Kiobel* majority and that therefore justify the result that has been pronounced by its sister Circuit Courts. The following summary aims to set out some of the central considerations that should play into the Supreme Court's decision making.

It is first of all noteworthy that the plain language of the statute does not exclude any particular class of defendants. The provision places requirements on the claim ("a tort … in violation on the law of nations") and on the plaintiff ("an alien"). The defendants of potential claims under the ATS, however, are not mentioned at all, which speaks in favor of the assumption that generally every kind of defendant can be sued under the statute, unless there can be found a specific legislative intent pointing to the opposite direction. This assumption is corroborated by the fact that the text of the statute refers to *any civil action*. This wording implies a broad understanding of the provision. Especially because an "alien" *plaintiff* within the meaning of the provision can also be a (non-US) corporation[82], by an analogous parity of reasoning, the statute should include corporate *defendants* as well[83].

The legislative history, moreover, does not show any intent to exclude certain classes of defendants, whereas the exclusion of certain groups of defendants is not a mechanism that

[81] *Id*.
[82] E.g. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986); reviewed 488 U.S. 425 (1989).
[83] DANIEL PRINCE (see supra note 27), 65.

is unknown to the structure of federal statutes. A different outcome could be reached if there were policy reasons that justified the exclusion of corporate plaintiffs. Policy considerations, however, do in fact speak in favor of holding corporations accountable under the ATS. The fact patterns have shown that there are particular settings in which corporations can get into a situation in which the participation in human rights abuses, however slight it may be, can further the corporation's business. There is, therefore, an actual danger that corporations will yield to these incentives. Judge *Leval* in the concurring opinion in *Kiobel* describes this concern in rather drastic words when he says:

> "According to the rule my colleagues have created [i.e. the rule that corporations cannot be held liable under the ATS], one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form."[84]

Whereas not every corporation operating abroad will exploit others commercially or will incorporate just in order to be able to commit human rights violations undisturbed by judicial review, the quote reflects an important policy concern that speaks in favor of corporate accountability under the ATS.

It is moreover doubtful if the Second Circuit in *Kiobel* employed the correct reading of footnote twenty in the Supreme Court's *Sosa* decision. As a reminder, the Court there stated that a "related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[85].

The footnote introduces private actors as opposed to public actors (states) into the discussion. It does not, however, employ a distinction between corporations and individuals, but does in fact place them onto the same level by giving examples for private actors. By relying on Justice *Breyer*'s concurring opinion in *Sosa*[86], the *Kiobel* majority from this wording drew the conclusion that international law must extend liability to the private actor the plaintiff is suing. However, *Breyer*'s reading of footnote twenty, and therefore the majority's reasoning, is at least doubtful because the ATS only requires a violation of the law of nations and does not mention a distinction between private actors. The amicus brief of

[84] *Kiobel* (2d Cir.), at 149-50 (*Leval*, J., concurring).
[85] *Id*. at 733 n.20.
[86] *Sosa*, at 760 (*Breyer*, J., concurring): "The norm [of international law] must extend liability to the type of perpetrator (e.g. a private actor) the plaintiff seeks to sue."

International Law Scholars takes the same position when it says that the "text [of the *Sosa* footnote] shows that the Court was referring to a single class of non-state actors (natural and juristic individuals), not two separate classes as assumed by the Kiobel panel majority..."[87]

Even assuming that international law, and not domestic law, is relevant for the determination of jurisdiction, the Court erred in interpreting international law on the relevant issue. When the *Kiobel* Court examined decisions of international tribunals, it found that no criminal liability was accorded to corporations. Civil liability, however, as pointed out by the *Kiobel* minority, is a different instance[88]. It is questionable to infer from a lack of criminal liability that there is a rule of international law prohibiting civil liability of corporations.

Even with regard to the corporation I.G. Farben in the state of liquidation in the aftermath of World War II, there was liability imposed on the corporate entity[89]. A Frankfurt Court, after being granted jurisdiction by the Allies, stated that the corporation had breached a duty to ensure humane treatment of its workers[90]. As it was the Allied tribunal that had granted jurisdiction to the national court, the case constitutes a precedent for an international tribunal granting subject-matter jurisdiction in view of a tort committed in violation of the law of nations by an entity[91]. The statement on the part of the *Kiobel* majority saying that international law has never extended its scope of liability to a corporation[92] is therefore not correct.

Additionally, there are several international treaties that hold corporations liable for violations of international law[93]. The *Kiobel* majority opinion found such treaties holding corporations liable, but had nevertheless declared these examples as being insufficient for its current analysis because they only referred to specific legal areas[94]. In view of the existing clear examples, this inference at least seems to be in need for further substantial justification. The summation of particular examples might as well speak in favor of a trend that is being established for a general rule on an expansion of corporate civil liability.

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[87] Brief of Amici Curiae International Law Scholars in Support of the Petition for Writ of Certiorari at 6-7, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Jul. 13, 2011), 2011 WL 2743197.

[88] *Kiobel* (2d Cir.), at 147 (*Leval*, J., concurring); cf. on the importance of *Leval*'s distinction MATTHEW E. DANFORTH, Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations, 44 Cornell Int'l. L. J., 659, 674 (2011).

[89] Cf. the same line of argument in *Flomo v. Firestone Natural Rubber Co*., LL.C., at 1017.

[90] Regional Court (Landgericht) Frankfurt a.M., Judgment in the Wollheim-Trial, June 10, 1953.

[91] DANIEL PRINCE (see supra note 27), 87.

[92] *Kiobel* (2d Cir.), at 132.

[93] HAROLD HONGJU KOH, Separating Myth From Reality About Corporate Responsibility Litigation, 7 J. Int'l. Econ. L. 263, 265 (2004) with examples.

[94] *Kiobel* (2d Cir.), at 138.

With regard to the policy considerations on corporate responsibility pointed out above, it is fair to ask the question: "If corporations are such significant actors in international relations and law, then can they not assume the obligations currently placed on States or individuals, based on those sets of responsibility?"[95]

In view of the textual and historical interpretation of the statute, the policy considerations behind corporate liability under the ATS, the interpretative arguments with regard to the Supreme Court's *Sosa* decision as well as precedents and treaties in international law, it is preferable to assume that corporations can be held liable under the Alien Tort Statute. The Supreme Court now has the opportunity to clarify the issue that is of importance for corporate and human rights litigation worldwide. It should use this opportunity and place into context the evidence put forward by courts and scholars that demonstrates that the *Kiobel* majority opinion of the Second Circuit must be considered – with the words of Judge *Posner*[96] – an "outlier".

[95] STEVEN R. RATNER, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale L.J. 443, 492 (2001).
[96] *Flomo v. Firestone Natural Rubber Co., LL.C.*, at 1017.

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